STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ANNA BROWN, Deceased.

STEVEN W. BROWN, SANDRA K. HALL, DOROTHY A. KARTZ, JEANETTE S. RAASCH, and RICHARD A. BROWN,

Petitioners-Appellees,

and

REINHOLD E. BROWN,

Intervening Petitioner,

v

SHERYL BREMER,

Respondent-Appellant.

UNPUBLISHED
December 11, 2003

No. 242910
Saginaw Probate Court
LC No. 01-110211-DE

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Respondent Sheryl Bremer appeals as of right from a judgment entered against her after a jury trial, and from an order denying her motion for judgment notwithstanding the verdict (JNOV), in this action involving two contested wills. Bremer's siblings, Steven Brown, Sandra Hall, Dorothy Kartz, Jeanette Raasch, and Richard Brown, accused Bremer of exercising undue influence on their mother, Anna Brown (Brown), who decided to exclude them from her will while she was living in Bremer's care. Because we conclude that a reasonable jury could infer that Bremer engaged in misrepresentation and moral coercion, we affirm.

I. Basic Facts And Procedural History

This matter began when Brown suffered a stroke in 1990 and became dependent on others' care. After Brown's husband died in 1996, Brown was put in a nursing home for two months until Hall volunteered to let Brown move in with her. In July 1997, Bremer agreed to care for Brown in her home, and Brown moved in with Bremer. According to Hall, Brown was dependent on Bremer for food, dressing, bathing, going to the bathroom, and driving. Although the siblings generally agreed that Bremer cared for Brown well, several expressed concerns that Brown was increasingly unable to understand others or express her own thoughts, and that Bremer generally answered questions and responded on Brown's behalf.

Steven Brown and Hall indicated that before 1997, Brown treated all her children equally, which Bremer verified. Hall stated that before her first stroke, Brown talked on the phone and saw family members frequently, and "sent a lot of cards." In December 1997, Brown was "happy to see everybody," and gave each of the children a gift of $2,000. However, Hall indicated that Brown "didn't seem to participate too much" at the holiday gathering. Steven also noticed that "a lot of times [Brown] wouldn't be able to say anything" and "could not put a complete sentence together."

By the end of 1998, Steven indicated, Brown's memory had deteriorated to the point where she was unable to provide direct answers or even sometimes understand questions. Kartz stated that before Brown's stroke Brown "loved all of her children," but around 1998 things changed and Brown started acting "out of character." Hall testified that she was unable to have any time alone with Brown when visiting at Bremer's house. Kartz confirmed this, and further stated that she was never able to contact Brown by telephone while Brown was at Bremer's house, even though before fall 1997, Brown had called Kartz "every other day at work." Raasch testified that telephone access to Brown was limited after Brown went to live with Bremer and that "you were just never alone in the house with Mom." Richard Brown testified that he and Brown communicated mostly by telephone during his life, but after Brown went to live with Bremer, he "really wouldn't get a chance to talk to her," because he was never left alone with Brown and Bremer's house was "never a comfortable atmosphere." He also stated that Brown, who normally responded to his birthday cards, stopped responding after 1998.

Steven Brown, Kartz, and Raasch all indicated that Bremer had "blocked" the other siblings from seeing Brown whenever she was in the hospital. According to Steven Brown, "you had to go in and register and they would say, well, you're not on the list to go up to see her. So we wouldn't see her." Raasch further indicated that "most of the time we didn't know she was in the hospital until she came home and it was word of mouth." The only time Steven Brown saw Brown after 1998 was in the winter of 1999, when, although "she didn't hardly say anything," "you could see that she understood," and she seemed happy to see him.

Bremer denied restricting telephone contact or visitation with her siblings. Reinhold Brown testified that in 1999 he was never held back from visiting or calling Brown, and in 2000 he visited Brown at least once a week. Edward Brown, Brown's brother, also testified that he was never denied access to Brown at Bremer's house. He further stated that his sister's mind was "sharp as a tack," and denied that any of his children had ever complained of being denied visitation with Brown at Bremer's house. Sharon Brown, Edward Brown's wife, stated that she was never restricted visitation or telephone access to Brown, and that between 1997 and January 2001, Brown could always understand her.

In the summer of 1998, Hall, who was still on Brown's checking account, discovered some "questionable withdrawals" while reviewing the bank statements that led her to believe that the account was being "depleted." In August 1998, Brown's revised will removed Hall as personal representative. In September 1998, Hall confronted Bremer about a change in Brown's will and did not see Brown again "for a long time" because she felt "not welcome" at Bremer's house. Steven Brown last visited Brown in September 1998, at which time "things were really starting to unravel." Kartz also indicated that by that time "we weren't seeing Mom."

Steven Brown, Hall, Kartz, Raasch, and Richard Brown wrote Bremer a letter asking what was happening with Brown's money. Bremer then contacted attorney Charles Wellman to inquire about "her obligations and duties" as Brown's attorney-in-fact. He advised Bremer that "she had an obligation not to divulge" certain information being requested by her brothers and sisters, and recommended that "the mother herself should respond." He indicated that he had not himself interviewed Brown and did not know if she was competent or subject to undue influence.

The siblings received a typed reply indicating that Brown's financial situation was not their affair and that Brown did not want to see them anymore. They received another letter indicating that there would be "an auction at the farm" and they would be considered trespassers there. Hall indicated that the response letter called them "vultures," which was language Brown would never use.

At some point in 1998, Steven Brown offered to purchase some property from Brown for $75,000, and discussed the transaction at Bremer's house when he believed no one else was around. The conversation ended when Bremer's son, Arthur Bremer, Jr., entered the room. Arthur testified that Brown was crying when he entered the room, although Steven Brown denied that Brown cried at any time during that conversation.

In May 2000, two parcels of land were sold from Brown's farm for $15,000 each, and Hall indicated that the signature on both deeds appeared to be Brown's. In June 2000, the rest of the farm was deeded to Bremer for $1. Bremer indicated that the first two land sales occurred "basically because [Brown] needed some money in her checking to take and clean the farm up" and to tear down a house that was falling down. Bremer also indicated that Brown wanted to give the remainder of the farm to her, and although the stated consideration was a dollar, she and her husband actually signed a $30,000 promissory note for it. The promissory note itself explicitly stated no set time for payment and was not secured by a mortgage. Bremer admitted that she did not pay the note before Brown's death and made no payments afterwards.

In August 1998, Bremer testified, Brown said she wanted to change her will, so Bremer took her to a lawyer and waited outside. The only change made at that time, Bremer stated, was that Bremer was named primary personal representative instead of Hall, which made Hall very upset, and the ensuing argument upset Brown as well.

Attorney Michael Weiss drafted a will, a durable power of attorney, and a health care power of attorney for Brown in August 1998, a codicil a month later, and a revised version of all three documents that December. Bremer took Brown to Weiss's office and filled out an initial intake sheet indicating what Brown purportedly wished. Pursuant to his normal office procedure, Weiss interviewed Brown alone in his office to make sure the information was correct and "to ascertain for [himself] if she had the mental capacity to be able to do a will." He concluded "that she was able to understand the questions [he] was asking and was able to answer them."

Brown told Weiss that she wished to disinherit her children other than Bremer and Reinhold Brown in her December will, and he discussed this with her alone in his office to ensure that doing so was her true intention. Weiss stated that Brown initially wanted to treat Reinhold and Bremer equally, but decided to give Bremer more because of the "beautiful care"

Bremer was taking of her. She further indicated that she wished to leave the other children out because "they don't come to see me." Weiss did not observe any undue influence.

In August 2000, Bremer testified, Brown requested again to be taken to her lawyer, and the resulting will reduced Bremer's share to half. Attorney Steven E. Eimers, who had been a registered nurse with experience caring for elderly patients, prepared that will. He met with Brown alone and indicated that she could describe the nature of her estate and her children. Brown explained that she was continuing to disinherit the five children because "these kids didn't want anything to do with her once she became older." Because he was concerned about undue influence, he met Brown at Bremer's home with Bremer out of the house, and testified that he "absolutely" found none.

Gerald Bernard Thomas, M.D., who was an expert in treating elderly patients, first saw Brown in 1996 or 1997 and continued to see her "quite frequently." He believed that Brown understood when he explained medical issues to her. He stated that she had neurological impairment and an "inability to express herself in full sentences" but he felt her to be "mentally still capable or able to express her wants and desires," and Dr. Thomas "personally felt that [he] could communicate her medical problems to her." He noted that Brown brought along "her daughter" to monthly examinations.

Psychologist Laura Morris examined Brown in Bremer's home in August 2000, but Dr. Morris did not recall if Bremer was actually present. One test indicated that Brown's "general brain functioning" was "not efficient," and Brown could not complete another test at all. Dr. Morris testified that this indicated limitations in "language, decision making, judgment making, speed of [sic] efficiency." Brown also did "poorly" on another test "sensitive to language functioning," and on that basis Dr. Morris "didn't feel that this woman was really competent to make decisions." Another test suggested dementia, which is "a loss of cognitive functioning, specifically memory," that affects a sufferer's "ability to make decisions and judgments."

Dr. Morris also testified that Brown could easily be unduly influenced, which, she indicated, meant to her "unusual types of influence, extreme influence out of the ordinary." Dr. Morris testified that Brown was not able to process information, and therefore not competent to make decisions; additionally, she was not able "to know the manner in which a deed or a will would dispose of any property that she might have." She further indicated that the observed condition had probably been present a year or two before her August 2000 examination. She emphasized that although Brown was able to put words together, "processing incoming information is a different matter." She also indicated that, although Brown was apparently bothered by legal problems involving her family, she was otherwise neat and well cared-for, and she liked where she was living.

Brown's November 7, 2000 deposition, which Bremer apparently attended, was read into evidence, although Brown's language difficulties made some of her answers unclear. Brown indicated that she had seven children, all of whom she loved, but not all of whom she wished to see. She indicated that some of her children had hurt her because they wanted her money and wanted to put her into a nursing home. She did not believe they were trying to help her, and she denied that Bremer had told her that the other children wanted her in a nursing home. Brown understood that she had transferred her farm to Bremer and that Bremer had not promised her

anything, but that the transfer was made on the understanding that Bremer would take care of Brown at her house for the rest of her life and not place Brown in a nursing home. Brown was satisfied with the care Bremer gave her and indicated that she had not liked living with Hall. She stated that she felt betrayed by her other children and did not enjoy seeing them when they came to visit. It was unclear whether Bremer had ever told Brown that some of her children had tried to call, but she indicated that she did not try to talk to them.

After a four-day trial, the jury found both the August 2000 and the December 2000 wills to be the result of undue influence, and further found Bremer had breached her relationship of trust with Brown and had unjustly enriched herself. The jury awarded petitioners $60,000 in damages and $75,000 in punitive and exemplary damages. Bremer moved for JNOV or, in the alternative, a new trial or remittitur, all of which the probate court denied. This appeal followed.

II. Denial Of Motion For JNOV

A. Standard Of Review

We review de novo the trial court's decision on a motion for JNOV, viewing the evidence and all legitimate inferences drawn therefrom in a light most favorable to the non-moving party.[1]

B. Undue Influence

Bremer acknowledges that she was in a fiduciary relationship with Brown, which gave rise to a rebuttable presumption of undue influence.[2] However, Bremer argues that she successfully rebutted that inference, and petitioners brought forth no affirmative evidence of undue influence although they had the burden to do so.[3] Therefore, Bremer asserts, because there was no evidence showing undue influence, the jury could not have reasonably found it, and the trial court should have granted JNOV.

As our Supreme Court has explained,

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient.[4]

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[1] *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

[2] See *In re Estate of Karmey*, 468 Mich 68, 73; 658 NW2d 796 (2003).

[3] See *In re Peterson Estate*, 193 Mich App 257, 260; 483 NW2d 624 (1991).

[4] *Karmey*, *supra* at 75.

Bremer points out that the only direct questions regarding undue influence were asked of the attorneys who drafted documents for Brown, and they denied that they observed any.

However, this Court has found that evidence of conduct aimed at isolating a grantor from his or her family and influencing the grantor's decisions is relevant to the question of undue influence.[5] In this case, there was evidence that Bremer had prevented petitioners from being able to contact or speak with Brown, that Brown was "a person that would be easily unduly influenced," and that Brown changed her will in favor of Bremer despite loving all her children because she believed that petitioners did not want to see her.

This Court has held that "a motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury."[6] "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand."[7] Reviewing the evidence and the legitimate inferences therefrom in the light most favorable to petitioners,[8] we conclude that a reasonable jury could infer that Bremer engaged in misrepresentation and moral coercion by preventing petitioners from being able to see Brown while telling Brown that they did not want to see her, causing Brown to feel "betrayed" by them. Because "reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury."[9] Therefore, the probate court appropriately denied Bremer's JNOV motion.

III. Jury Instructions

Bremer also argues that the instruction given to the jury misstated the law because it did not explain that the burden of proof remained with petitioners, and also failed to explain that the inference of undue influence disappears once it is rebutted. However, not only did Bremer fail to object to these instructions at trial, she also stipulated to them. Therefore, this issue is waived, and we decline to address it.[10]

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

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[5] *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999).

[6] *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).

[7] *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

[8] *Sniecinski, supra* at 131.

[9] *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

[10] See *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001) ("A party cannot stipulate a matter and then argue on appeal that the resultant action was error").